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668748—45

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 404

JACK DAVIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 210-216) has not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered August 8, 1945 (R. 217). The petition for a writ of certiorari was filed September 6, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether the ration coupons introduced in evidence against petitioner were obtained as the result of an unreasonable search and seizure.

STATUTE AND REGULATIONS INVOLVED

Section 2 (a) of the Act of June 28, 1940 (54 Stat. 676), as amended by the Act of May 31, 1941 (55 Stat. 236), and by Title III of the Second War Powers Act of March 27, 1942 (56 Stat. 177), 50 U. S. C. App., Supp. IV, 633, provides in part:

> (2) * * * Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense.
>
> * * * * * *
>
> (5) Any person who willfully performs any act prohibited, or willfully fails to perform any act required by, any provision of this subsection (a) or any rule, regulation, or order thereunder, whether heretofore or hereafter issued, shall be guilty of a misdemeanor, and shall, upon conviction,

be fined not more than $10,000 or imprisoned for not more than one year, or both.

* * * * *

Ration Order 5C issued by the Office of Price Administration (7 F. R. 9135 ff. as amended) provides in pertinent part as follows:

Section 1394.8153. (a) *Coupons issued for registered and commercial motor vehicles.* Transfers may be made and accepted under the following conditions in exchange for Class A, B, C, D, or T coupons having an aggregate unit value equal to the amount of gasoline transferred. However, if the transferee is able to accept only a portion of the amount of gasoline represented by the unit value of the coupon, the transferor shall nevertheless require the surrender of an entire coupon.

* * * * *

Section 1394.8217. (a) Every dealer and intermediate distributor shall be accountable for all gasoline ration credits, gasoline deposit certificates, coupons and other evidences received by him. Gasoline deposit certificates, coupons and other evidences received at or for a place of business shall be, at all times when the dealer or distributor is open to transact business, retained by him at the place of business for which they were received, or deposited in a ration bank account maintained for that place of business, until such time as they are surrendered to a dealer or distributor in exchange for gasoline, or

otherwise surrendered pursuant to Ration Order No. 5C. The aggregate gallonage value of gasoline deposit certificates, coupons and other evidences on hand or on deposit for each place of business of a dealer or intermediate distributor, shall, at all times, be equal to, but not in excess of, the number of gallons of gasoline which would be required to fill the storage capacity of such place of business, as shown by the current certificate of registration, * * *

Section 1394.8235 (b). All tire inspection records and gasoline deposit certificates and all coupon books, coupons, and other evidences are, and when issued shall remain, the property of the Office of Price Administration. Upon demand made by any investigator of the Office of Price Administration or by any police officer, constable, or other law enforcement officer of the United States or of any state, county, or local government, every person shall produce for inspection any tire inspection record and gasoline deposit certificate and any gasoline coupon books, coupons, and other evidences in his possession or control, whether valid, invalid, void or expired, and whether or not issued or acquired in accordance with Ration Order 5C. Investigators of the Office of Price Administration and all police officers, constables and other law enforcement officers of the United States, or of any state, county or local government are authorized

to make such inquiries of any person as may be pertinent to determine whether a violation of Ration Order No. 5C has been or is being committed, and are authorized to receive the surrender of all gasoline deposit certificates, gasoline coupon books, coupons and other evidences acquired by any person otherwise than in accordance with Ration Order 5C, whether valid, invalid, void or expired.

STATEMENT

Petitioner was convicted in the District Court for the Southern District of New York on a charge of unlawfully possessing 168 gasoline ration documents consisting of "A" coupons in sheet form (R. 4, 189). He was sentenced to imprisonment for six months and to pay a fine of $1,000 (R. 191). On appeal, the judgment was affirmed (R. 2, 17).

The only question raised concerns the validity of the search by which the ration coupons, which were introduced in evidence, were obtained. The facts in respect of that issue were developed at a pretrial hearing before the court without a jury on a motion to suppress (R. 7–8, 11–18). The evidence adduced at that hearing, taking the view most favorable to the Government,[1] may be summarized as follows:

[1] At the conclusion of the hearing the trial judge stated that he credited the Government's witnesses (R. 157).

On June 20, 1944, two detectives of the New York City police and three O. P. A. investigators drove near the gasoline station owned by the corporation of which petitioner was president (R. 18–19, 27, 163). One of the O. P. A. investigators, Sussman, took a marked $5 bill and drove into the station (R. 19, 29–30). He told the woman attendant in charge that he wanted his tank filled but had no coupons (R. 69). She sold him 11.8 gallons of gas for which she charged him $4.82, twenty cents per gallon above the ceiling price. Sussman paid for the gasoline with the marked $5 bill (R. 69–70, 95–97). The attendant wrote on a piece of cardboard the price charged for the gasoline (R. 71, 78–79, 96). A short time later another O. P. A. investigator, Pearman, also took a marked $5 bill and drove to the station (R. 29, 81). He purchased five gallons of gasoline without giving coupons therefor, at twenty cents per gallon above the ceiling price (R. 103–104).

A short time later, all five officers returned to the premises and questioned the attendant (R. 20, 31, 71). She stated that petitioner told her she could sell gasoline without demanding coupons to anyone whom she knew or whom he recommended (R. 21, 73, 84). At the officers' request she took from her pocket the money she had collected, including the marked $5 bills, and the slip of paper on which she had noted the money collected

(R. 20, 22, 31, 36–37, 71, 73, 79, 83–84). The officers told the attendant she was under arrest (R. 50, 51, 105).

While the officers were questioning the attendant, petitioner drove up (R. 22, 37, 73, 84). He was confronted with the attendant, who repeated her account of petitioner's directions to her (R. 23–38, 74, 85). Petitioner was told he was under arrest (R. 25, 50, 67–68, 73, 84). One of the officers examined petitioner's car and asked petitioner where he kept the coupons received for the sale of gasoline. Petitioner stated that the coupons were in small metal containers attached to the gasoline pumps. He gave the agents the key to the boxes. (R. 23.) While talking with the officers, petitioner walked away and handed some keys to Payne, his partner in the tire business (R. 74, 85, 125). Payne was followed by one of the O. P. A. investigators (R. 74, 85).

One of the O. P. A. investigators measured the contents of the gasoline tanks and counted the stamps in the containers (R. 23). His tabulations revealed that petitioner did not have in the containers stamps sufficient to account for the difference between the storage capacity of the tanks and the gasoline actually contained therein (R. 23–24; see also R. 42–46).

While the investigator was making the tabulation, Detective Fitzpatrick and an O. P. A. agent

took petitioner to the office of the gasoline station (R. 40). They remained in the waiting room adjoining petitioner's private office, the door of which was locked (R. 40, 75, 86). The detective endeavored to persuade petitioner to open the door of his private office, telling him that he was already under arrest for having sold gasoline at above ceiling prices, and that he would fare better if he cooperated with the officers (R. 25–26, 40–42, 67–68, 87, 92–93). At one time petitioner asked how many coupons he was short, and when told that the number was about 1,100, he stated, "I have enough to cover that" (R. 42). While Fitzpatrick was talking to petitioner, they saw the other detective flashing his light through the window in the door leading into the private office. At that point petitioner agreed to open the door of the office. (R. 48.) He took the keys from the O. P. A. agent who had followed Payne, and opened the door. He gave the agents several envelopes, which he removed from a metal cabinet in the office, and which contained ration coupons, including those which formed the basis of the count of the information on which he was convicted. (R. 26, 47, 57–60, 75–76, 87–89.)

Petitioner was then taken to the O. P. A. office in New York and questioned there (R. 60–62). The enforcement attorney directed the detective to book petitioner (R. 62–63), but on the way out petitioner said that he would make a further state-

ment (R. 63–64). He was allowed to go home when he promised to aid the Government in locating the seller of the ration stamps (R. 63–64, 66).

The trial judge denied the motion to suppress on the ground that there had been voluntary consent to the search (R. 157). The circuit court of appeals expressed some doubt as to the voluntariness of petitioner's consent (R. 211), but held that the search was nevertheless a reasonable one (R. 211–215).

ARGUMENT

1. Petitioner challenges (Pet. 13–15, 18–27) the holding of the court below that the ration coupons introduced in evidence were obtained as the result of a lawful search. The circuit court of appeals based its ruling on the well established principle that, as an incident to a lawful arrest, the premises where the arrest is made may be searched for the instrumentalities of the crime. *Marron* v. *United States*, 275 U. S. 192, 199; *Agnello* v. *United States*, 269 U. S. 20, 30; *United States* v. *Lindenfeld*, 142 F. 2d 829 (C. C. A. 2), certiorari denied, 323 U. S. 761. Although the fact was not stressed in the opinion of the court below, it should be noted that the gasoline station which was searched was owned by a corporation, not petitioner (R. 163). The O. P. A. investigators had witnessed offenses committed by the corporation through its agent, the station attendant, who had been authorized by petitioner

to sell gasoline without receiving coupons. They therefore had authority, as private citizens, to arrest and did arrest the attendant, and petitioner, the responsible officer of the corporation which committed the crimes.[2] As incidental to that arrest, they clearly had authority to examine the coupons in the containers attached to the pumps and to measure the amount of gasoline in the tanks, and, in fact, petitioner consented to the examination of those coupons. The discrepancy between the coupons found at the pumps and the amount of gasoline sold indicated that there must be other coupons on the premises. To be able to sell gasoline without receiving coupons, the corporation, if it intended to continue in business, would be obliged to obtain coupons from some source other than its customers, for it needed coupons

[2] Section 183 of the New York State Code of Criminal Procedure provides that a private person may arrest another for a crime committed or attempted in his presence, and Section 185 provides that the person so arrested must, without unnecessary delay, be taken before a magistrate or delivered to a peace officer. Here, the persons arrested were immediately delivered to the peace officers, the New York City detectives who accompanied the investigators. The act of selling at prices above ceiling is a violation of New York as well as federal law, for the State of New York has made violations of federal price regulations a state crime. New York State War Emergency Act Laws of 1942, c. 544, as amended; Resolution of the New York State War Council, issued April 28, 1943; see also Local Law No. 35 of the Laws of New York City for 1945, which penalizes violations of federal rationing and price regulations. Pike and Fischer, *O. P. A. Price Service, General Desk Book 1*, pp. 5981–5983.

to purchase more gasoline (see R. 45). The inference that the corporation had other illegally acquired coupons was fortified by petitioner's own admission that he had coupons to cover the shortage. Under such circumstances illicit coupons were, as the court below held, the direct means of committing the crime witnessed by the investigators (R. 214), as vital a factor in the criminal enterprise as the ledger seized in the *Marron* case or the physician's cards seized in the *Lindenfeld* case, *supra*. The search for the coupons in premises under the immediate possession and control of the corporation in the place where the offense was committed and the arrests made, was therefore a reasonable one under the *Agnello* and *Marron* decisions, *supra*. This was not a situation where there was no lawful arrest, as in *Go-Bart Importing Co.* v. *United States*, 282 U. S. 344, or where the officers engaged in a general exploratory search for whatever evidence they might find, as in *United States* v. *Lefkowitz*, 285 U. S. 452. Here, pursuant to a lawful arrest, there was a search, not for evidence, but for the instrumentalities of the crime.

2. Although the circuit court of appeals found it unnecessary to decide the point, we think that the admission of the coupons in evidence may be sustained for the reason found by the district court, that petitioner voluntarily surrendered the coupons to the agents. The nature of petitioner's consent must be judged in relation to the fact

that the property which the officers were seeking to examine belonged neither to petitioner nor to the corporation, but to the Government, and that petitioner was required to permit inspection of such documents. See Section 1394.8235 (b) of Ration Order 5C, *supra*, pp. 4–5. We do not urge that this fact justifies a forcible search of the premises, but we do think it is an important factor to be considered in determining whether petitioner's act in turning over the coupons was a voluntary one. In attempting to persuade petitioner to permit inspection of the coupons the officers were not urging him to waive a right; they were merely insisting that he comply with his duty under the rationing regulations. And, when petitioner did finally take the ration coupons from the cabinet and give them to the officers he was doing no more than the law required him to do. This is a very different situation from one in which arresting officers during the course of an arrest examine documents which they would otherwise have no right to inspect. Here, with or without evidence of the commission of a crime, or an arrest, the officers had a lawful right to examine the government property entrusted to petitioner. In the circumstances, although petitioner's compliance with his duty was reluctant, we submit that his action in turning the coupons over to the agents was properly found by the district court to have been voluntary.

CONCLUSION

It is respectfully submitted that, for the reasons stated, the judgment below is correct and the petition for a writ of certiorari should therefore be denied.

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